IN THE

SUPREME COURT OF THE UNITED STATES

June Term, 1958.

No. 207

LEE ROY GRANT, ... Petitioner,

versus

UNITED STATES OF AMERICA, . . Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ~~SEVENTH~~ CIRCUIT.

BERT C. CHEATHAM,
MARION J. RICE,
JACK N. VANSTONE,
The Court Building,
Evansville, Indiana,
Counsel for Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

_____ Term, 1958.

No. _____

LEE ROY GRANT, - - - - - *Petitioner,*

v.

UNITED STATES OF AMERICA, - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that the writ of certiorari issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on the 29th day of May, 1958.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit affirming the above judgment is printed in Appendix A, page 15.

The judgment of the United States District Court for the Western District of Kentucky, Owensboro Division was entered on the 10th day of September, 1957 and appears in Appendix D, page 23.

JURISDICTION.

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on the 29th day of May, 1958. Petitioner's petition for rehearing was timely filed as approved by the rules of the United States Court of Appeals for the Sixth Circuit, to-wit: June 16, 1958, and petitioner's petition for rehearing was denied on the 26th day of June, 1958.

This petitioner filed his application for stay of mandate pending final determination of this cause by the Supreme Court of the United States upon his application for writ of certiorari; petitioner further says that said application for stay of mandate pending final determination of this court by the Supreme Court of the United States upon his application on writ of certiorari was granted on the 21st day of July, 1958 in accordance with rule 30 of the United States Court of Appeals for the Sixth Circuit.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254

Jurisdiction was conferred upon the United States Court of Appeals for the Seventh Circuit by 28 U.S.C. 1291.

QUESTIONS PRESENTED.

I. The conviction of the petitioner violated his constitutional rights as protected by the Fifth Amendment to the Constitution of the United States of America in this: "No person * * * shall be deprived of life, liberty or property without due process of law."

II. The petitioner not convicted by substantial evidence.

The petitioner was not convicted by substantial evidence. The substantial rights of the petitioner were materially affected by the admissions under which petitioner's objections of testimony of other criminal offenses not included in the several counts of indictment and the evidence considered most favorable to the government was not sufficient to support conviction in that it consisted solely of the testimony of a self-confessed leader of a vast stolen car ring.

III. The petitioner did not receive a fair trial according to the standards and principles of our great nation as heretofore established by the rules of this court.

IV. The substantial rights of the petitioner have been materially effected by the lower court's erring in:

(1) Admitting testimony of other criminal offenses not germane to the stipulation.

(2) Improperly instructing the jury as to the nature and effect of the stipulation.

(3) Failing to instruct the jury concerning the consideration to be given testimony of other criminal offenses.

(4) Improperly instructing the jury as to the consideration to be given testimony of character witnesses.

(5) Improperly instructing the jury as to the weight and credibility to be given to the testimony of a self-confessed alleged co-respondent.

(6) Improperly instructing the jury as to the weight and credibility to be given the testimony of the defendant.

(7) Refusing to sustain petitioner's motion for a new trial.

THE STATUTES INVOLVED.

The pertinent statutory provisions are printed in Appendix B, page —, and are as follows, to-wit:

18 U.S.C. Section 2313.

Constitution of the United States,
Fifth Amendment.

28 U.S.C. Section 1254.

28 U.S.C. Section 1291.

CONCISE STATEMENT OF CASE CONTAINING FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

The jurisdiction of the court of the first instance arose from the hereinafter referred to indictment based upon 18 U.S.C. Section 2313.

The petitioner was originally charged in six counts of an indictment (Appendix C, page —) of reportedly receiving and concealing stolen automobiles which were moving in interstate commerce.

The petitioner was first tried in February of 1957 and resulted in the jury being unable to agree upon a verdict, whereupon the case was continued until the September Term in 1957, at which time the petitioner was again tried and the jury found the defendant not guilty of counts one, two and three, but guilty of counts four, five and six of said indictment. By virtue of a stipulation, the case was tried only as to issue of knowledge on the part of the petitioner. Upon the findings of the jury, a trial court entered a judgment adjudging the defendant guilty of counts four, five and six of said indictment and sentencing him for a period of two years on each count, said sentences to run concurrently.

The Government's case was based upon the testimony of one Rufus Owen Hesson (App., 4a-20a), who testified in general that he and one Orrin Wright, had operated a stolen car ring for about a year before the first date of this indictment. That they had stolen ten or fifteen cars before meeting Grant. That in the latter

part of 1953, he and Wright went to Madisonville and while he sat in the car, out of hearing distance, Wright engaged Grant in a conversation. That he heard nothing and knew nothing of the subject of this conversation (App. 19a). That thereafter he began delivering cars to Madisonville, parking them behind Grant's motel, and later collecting his share from Wright. That he did all this under the direction of Orrin Wright. By his admission, he was an accomplice and a convicted felon. Later he specifically testified as to each car alleged in the indictment. Orrin Wright was at the time of the trial in a federal penal institution (App. p. 14b). But did not appear and testify.

The defense was based upon the testimony of the appellant, Lee Roy Grant, who testified in general (App. 20a-31a), that he operated a used car lot in Madisonville. That he frequently purchased cars from dealers from various places and that he sold said cars to persons living in and around Madisonville, Kentucky. That he did not know Rufus Owen Hesson, and that he had never seen him prior to the first trial of this case. That he had no deal with Orrin Wright concerning automobiles, legitimate or stolen. That he never knowingly received any stolen car, and never attempted to conceal the identity of any car.

During the trial over the objections of the petitioner, the government elicited testimony from its witnesses to the affect that certain other cars, not named in the indictment, had been stolen and were delivered to the petitioner's place of business.

REASONS FOR GRANTING WRIT.

I. THE PETITIONER WAS NOT GIVEN A FAIR AND IMPARTIAL TRIAL IN THAT THE TRIAL COURT ADMITTED TESTIMONY OF OTHER OFFENSES NOT INCLUDED IN THE INDICTMENT. The Government elicited testimony from the witness Rufus Owen Hesson concerning a 1953 Cadillac, which testimony was objected to by the petitioner (App., 3a-7a, 9a, 14a-16a). This evidence was to the affect that the witness, Rufus Owen Hesson, had stolen the car and put it in the petitioner's garage; that the petitioner told him to take it back because the witness, Hesson, had not changed one of the numbers on the car (App., p. 21b).

The appellant submits that this evidence was only submitted for the purpose of prejudicing him and in that connection wishes to call to the attention of the court to the parts of the proceeding and the trial. First, the Cadillac transaction was refererd to by the District Attorney in his opening statement (App., p. 14b). Second, Marvin T. Bell, special agent for the Federal Bureau of Investigation, a witness for the prosecution without then being responsive to the questions asked him, blurted out "In addition to those six he sold several others that were also stolen, a total of twelve" (App., p. 79b). Then again later he blurted out "and I might add, Mr. Bratcher, that there were three or four other cars interspersed with these that he is charged with . . ." (App., p. 82b).

The petitioner has contended and the Government not denied that:

> "It is a well established principal of law that upon the trial of an indictment charging a specific crime against the accused, it is not competent for the prosecution to put in evidence, proof tending solely to show that the defendant had been guilty of other similar offenses." *Laughlin* v. *U. S.*, 92 F. 2d 506.
>
> "It is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself." *Niederluecke, et al.* v. *U. S.*, 21 F. 2d 511, *Boyd* v. *U. S.*, 142 U. S. 450, 12 St. Ct. 292, 35 L. Ed. 1077.

II. Substantial rights of petitioner affected.

(a) Petitioner contends that his conviction was not supported by competent and or substantial evidence, and, as a result thereby, did not receive a *fair trial* according to the standards and principles of our great nation as heretofore established by the rules of this court.

The only conflict in the evidence bearing directly upon the issue presented to the court was contained in the evidence of two witnesses, the first being for the prosecution by the witness, Rufus Owen Hesson, who was a self-confessed leader of a vast stolen car ring and the other was the defendant who denied his charges.

As to count four, Hesson testified that between May 19, 1955 and August 16, 1955, he took a 1955 Chevrolet sedan from Evansville to Madisonville and parked it behind a motel and saw Skinner Wright later on, when he collected the money for the automobile (App., p. 26b). He did not testify that he had any personal contact or conversation with the appellant concerning this transaction.

As to count five, Hesson testified that in January, 1954, he took a 1953 Chevrolet from Evansville to Madisonville; that he had not changed the engine; that he asked the appellant where he could work on the car and the appellant took him to a place and left him, where Hesson changed the car and took it back to the appellant's car lot, gave him the title to the '53 Chevrolet and paid him $350 or $400 (App., pp. 26b, 27b). Hesson testified that he used the garage to change the number on a '53 Chevrolet; he did not testify that he told the appellant that the automobile was stolen or that he told the appellant that he was going to change the numbers on the automobile.

As to count six, Hesson testified that in March of 1954 he took a 1953 Chevrolet from Indianapolis to Madisonville and he either left it on the car lot or behind the motel, he wasn't sure (App., p. 29b) and that he was paid for this car by Skinner Wright (App., pp. 29b, 30b). He did not testify that he had any personal contact or conversation with the appellant concerning this transaction.

Much of the evidence that Hesson testified to was obtained through a man by the name of Skinner Wright

who was by the admission of the District Attorney in a federal institution at the time of the trial (App., p. 14b). Thus, we have the testimony of Hesson which does not directly bear upon the relationship of the appellant to these transactions. The denial of the appellant and the absence of a witness who was at the time in the custody of the federal authorities.

Thus, the appellant believes that the verdict of the jury can in no way be consistent with the evidence given them.

(b) The court improperly instructed the jury as to the nature and effect of the stipulation. A stipulation was entered into to the effect that the automobiles alleged in the indictment were stolen, were in interstate commerce, and were received by the petitioner, leaving for the jury to decide the issue of knowledge and concealment on the part of the petitioner. In instructing the jury the court discussed at large, the stipulation entered into and in such a manner as to leave the impression that the defendant was three-fourths guilty by admission. The petitioner's disposition to co-operate should not be taken advantage of by having it submitted to the jury in such a manner as to make it susceptible to misinterpretation by the jury to his prejudice. This instruction unduly emphasized the stipulation and distorted its meaning.

(c) The court failed to instruct the jury concerning consideration to be given testimony of other criminal offenses. Over the appellant's objection, the court admitted testimony of other criminal offenses. The testimony having been admitted; the court failed

to instruct the jury as to its affect, that is that they were not to convict the defendant on the grounds that he may have committed other criminal offenses and should only consider such testimony as it relates to the crimes he was charged with. *Boyd* v. *U. S.*, 142 U. S. 450, 12 S. Ct. 292, 35, L. Ed. 1077; *Witters* v. *U. S.*, 106 F. 2d 837.

(d) The court improperly instructed the jury as to the consideration the jury should give to the testimony of character witnesses (App., p. 138b). Instruction used by the court is similar to the one condemned by the court in the case of *Hayes* v. *U. S.*, 227 F. 2d 540, 545:

> "It does not tell the jury that the character testimony may be such that it alone may create a reasonable doubt, although without it the other evidence would be convincing."

The instruction given by the court gave the jury the opposite meaning when the court said:

> "It does not necessarily follow, however, that because a man has a reputation for honesty and good character that he has not committed the acts with which he is charged" (App., p. 138b).

This instruction nullified any affect the testimony of the character witnesses may have had and therefore, the court erred only in not properly instructing the jury but also in instructing them erroneously.

(e) The court failed to properly instruct the jury as to the weight and credibility it should give to the testimony of Rufus Owen Hesson. The jury was told that Hesson had

"Admitted and testified that he stole these cars and therefore, since whoever commits the offense against the United States or aids or abets or counsels, commands, induces, or procures its commission is a principal and is subject upon commission to punishment just the same as if he had committed the act himself" (App., p. 138b).

But the court failed to caution the jury that such testimony "Must be carefully scrutinized, weighed with great caution and that too much reliance should not be placed upon it unless corroborated." *Johns* v. *U. S.*, 227 F. 2d 374, 375. To the contrary, the jury was told:

"Hesson is an accomplice of this defendant from his testimony, if you believe it, and if you do find that the witness Hesson took part in the commission of the unlawful acts for which this defendant is charged, his testimony is to be received by you with caution and you should not accept it unless so far harmonized with the other testimony in the case as to leave in your minds no reasonable doubt of its truth" (App., p. 139b).

This instruction had the same affect as the one given in the case of the *United States* v. *Balodinas*, 177 F. 2d 485, 487:

"If the jury accepted the court's theory that these witnesses were accomplices and had openly admitted that they were law violators and that they had a part in the commission of the crime, it is difficult to discern how they could have avoided the conclusion that the defendant was also guilty. The charge presupposes that the crime charged had been committed by the defendant and that the wit-

nesses had openly admitted their part in its commission. Ordinarily in a criminal trial there is no question but that a crime has been committed; the question at issue is whether it was committed by the defendant. Here, we have the reverse of that situation. The question for determination was whether a crime had been committed. The effect of this instruction was to resolve that question in the affirmative. With such a resolution there was nothing for the jury to do but to find the defendant guilty."

(f) The court's failure to instruct on the legal principles favorable to the defendant was aggravated by sharp and pointed instructions favorable to the prosecution. This is illustrated by the final paragraph of the court's instructions wherein he stated "The credibility of the witnesess and of the defendant is a factual issue, and in determining the credibility of the witness you shall consider among other things, the interest that the witness or the defendant might have in the outcome of this case" (p. 10 of the appellant's brief).

CONCLUSION.

In conclusion, the petitioner earnestly prays that a writ of certiorari issue.

Respectfully submitted,

BERT C. CHEATHAM,
MARION J. RICE,
JACK N. VANSTONE,
Attorneys for the Appellant.

APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 13430.

LEE ROY GRANT, - - - - - - - *Appellant,*

v.

UNITED STATES OF AMERICA, - - - - - *Appellee.*

Appeal from the District Court of the United States, For the Western District of Kenucky, Owensboro Division.

Decided May 29, 1958.

Before Martin and McAllister, Circuit Judges, and Jones, District Judge.

PER CURIAM. Appellant was convicted by a jury of the offense of knowingly receiving and concealing stolen automobiles, moving in interstate commerce, in violation of *Title* 18 U. S. C. A. *Section* 2313. On appeal, he contends that the trial court erred in permitting evidence to be introduced by the government of another offense claimed to have been committed by him, and not charged against him in the indictment. The evidence in question which was submitted by the government, disclosed that a Cadillac car, not mentioned in the indictment, had been delivered to appellant by Hesson, the man who had stolen it; that appellant had complained to Hesson that he had neglected to alter a motor

number on the frame of the vehicle; that Hesson then took the Cadillac car with him in order to alter the number, but after doing so failed to redeliver it to appellant, and, instead, sold it to another party; that Hesson finally delivered to appellant a stolen Oldsmobile car described in one of the counts of the indictment; and that this Oldsmobile was accepted by appellant as a replacement for the Cadillac.

In *Harper* v. *United States*, 239 F. 2d 945 (C.A. D.C.), the rule here applicable was stated as follows:

> "The general rule is that upon the trial of an accused person the prosecution may not introduce evidence of another offense wholly independent of the one charged. However, there are many well established exceptions to this rule, so numerous that it has been said that it is difficult to determine which is the more extensive, the doctrine or the knowledge exceptions. This court has admitted evidence of other criminal acts when those acts (1) are so blended or connected with the one on trial that proof of one incidentally involves the other, (2) they explain the circumstances of the offense charged, or (3) they tend logically to prove any element of that offense."

The evidence of the other crime of which appellant complains, is clearly within the purview of the exceptions above mentioned, and was properly admitted by the trial court.

With regard to the instructions to the jury, which appellant contends were erroneous, no objection was made by counsel when the instructions were given, and under Rule 30 of the Federal Rules of Criminal Procedure, no error may now be assigned thereon.

Appellant further claims that the jury's verdict finding him guilty on certain counts, was inconsistent with its verdict finding him not guilty on other counts, and consequently the verdict of guilty should be set aside.

Appendix A

If the verdict of the jury be intelligible and based on sufficient evidence to support it, the mere fact that such verdict appears to the court to be illogical or the result of a misconception of fact or mistakes of judgment by the jury, or to be otherwise unreasonable and contrary to fact, does not affect its sufficiency or validity. *Gozner* v. *United States*, 9 F. 2d 603, (C.C.A. 6). When at the same trial, a jury renders inconsistent verdicts of acquittal and conviction, the inconsistency is immaterial and the conviction will stand. *United States* v. *Coplon*, 185 F. 2d 629.

The judgment of the District Court is affirmed.

APPENDIX B.

Federal statutes involved as passed by Congress:

18 U. S. C. Section 2313. Sale or receipt of stolen vehicles—

> Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 806.

Constitution of the United States, Fifth Amendment:

> No person shall be deprived of life, liberty or property without due process of law.

28 U. S. C., Section 1254.

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U. S. C., Section 1291.

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Section 269, Judicial Code, as amended by 28 U. S. C., Section 391.

> All United States courts shall have power to grant new trials, in cases where there has been a trial by

jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, effects, or exceptions which do not affect the substantial rights of the parties.

APPENDIX C.

In the
DISTRICT COURT OF THE UNITED STATES
For the Western District of Kentucky
At Owensboro

No. _____.
(18 U. S. C., Sec. 2313)

United States of America,

v.

Lee Roy Grant.

INDICTMENT.

The Grand Jury charges:

FIRST COUNT.

On or about and between August 2, 1954, and November 23, 1954, in the Western District of Kentucky, Lee Roy Grant received and concealed a stolen motor vehicle, to-wit, a 1954 Oldsmobile Sedan, Motor No. V99898, Serial No. 548A5782, which was moving as interstate commerce, that is, in commerce from Tampa, State of Florida, to Madisonville, State of Kentucky, and he then knew the motor vehicle to have been stolen.

The Grand Jury further charges:

SECOND COUNT.

On or about the 26th day of June, 1955, in the Western District of Kentucky, Lee Roy Grant received and con-

cealed a stolen motor vehicle, to-wit, a 1955 Chevrolet automobile, Motor No. DMV 19445, Serial No. 558090828, which was moving as interstate commere, that is, in commerce from Vincennes, State of Indiana, to Madisonville, State of Kentucky, and he then knew the motor vehicle to have been stolen.

The Grand Jury further charges:

THIRD COUNT.

On or about and between July 8, 1955, and October 20, 1955, in the Western District of Kentucky, Lee Roy Grant received and concealed a stolen motor vehicle, to-wit, a 1955 Oldsmobile 98 Holiday Coupe, Motor No. V 439255, Serial No. 559M5714, which was moving as interstate commerce, that is, in commerce from Vincennes, State of Indiana, to Madisonville, State of Kentucky, and he then knew the motor vehicle to have been stolen.

The Grand Jury further charges:

FOURTH COUNT.

On or about and between May 19, 1955, and August 16, 1955, in the Western District of Kentucky, Lee Roy Grant received and concealed a stolen motor vehicle, to-wit, a 1955 Chevrolet Sedan, Motor No. 008414F550, Serial No. 55N033258, which was moving as interstate commerce, that is, in commerce from Evansville, State of Indiana, to Madisonville, State of Kentucky, and he then knew the motor vehicle to have been stolen.

The Grand Jury further charges:

FIFTH COUNT.

On or about the 21st day of January, 1954, in the Western District of Kentucky, Lee Roy Grant received and concealed a stolen motor vehicle, to-wit, a 1953 Chevrolet

automobile, Motor No. LAQ 501507, Serial No. 53S197348, which was moving as interstate commerce, that is, in commerce from Evansville, State of Indiana, to Madisonville, State of Kentucky, and he then knew the mtor vehicle to have been stolen.

The Grand Jury further charges:

SIXTH COUNT.

On or about and between March 1, 1954, and March 17, 1954, in the Western District of Kentucky, Lee Roy Grant received and concealed a stolen motor vehicle, to-wit a 1953 Chevrolet Coupe, Motor No. LAA 385420, Serial No. 53S056728, which was moving as interstate commerce from Indianapolis, State of Indiana, to Madisonville, State of Kentucky, and he then knew the motor vehicle to have been stolen.

USCA 18, Sec. 2313

F nm 5000 or I nm 5 y or b

A True Bill

_____

Foreman.

_____

United States Attorney.

APPENDIX D.

UNITED STATES DISTRICT COURT
For the Western District of Kentucky
No. 5466.

United States of America,

v.

Lee Roy Grant.

JUDGMENT AND COMMITMENT.

On this 10th day of September, 1957 came the attorney for the government and the defendant appeared in person and by counsel, Robert Tapp and Rhodes Bratcher.

It is Adjudged that the defendant has been convicted upon his plea of not guilty and verdict of guilty of the offenses of receiving and concealing stolen motor vehicle, which was moving as interstate commerce in violation of T. 18, Sec. 2313, U.S.C.A., as charged in Counts 4, 5 and 6 of the Ind., and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted. Pre-sentence report was furnished by the Probation Office and read by the Court.

Appendix D

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Two years on Count 4
Two years on Count 5
Two years on Count 6

It is Adjudged that said sentence shall run concurrently, each with the other.

It is further ordered that execution of sentence be suspended until September 25, 1957, at 10 A.M., defendant to remain under present terms of his bond for his appearance at Marshal's Office in Louisville.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to:

(s) Henry L. Brooks,
United States District Judge.

Martin R. Glenn,
Clerk.

A True Copy. Certified this 19th day of September, 1957.
(Signed) (s) Martin R. Glenn. (By) (s) Ethel S. Brown,
Deputy Clerk.

(Seal)

FILE COPY

FILED
AUG 18 1958
JAMES R. BROWNING, Clerk

No. 207

In the Supreme Court of the United States

OCTOBER TERM, 1958

LEE ROY GRANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 207

LEE ROY GRANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 15–17) is reported at 255 F. 2d 341.

JURISDICTION

The judgment of the Court of Appeals was entered on May 29, 1958 (R. 184). A petition for rehearing was denied on June 26, 1958 (R. 198). The petition for a writ of certiorari was filed on July 23, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the district court erred in admitting evidence of an offense which was not alleged in the indictment but which was intimately related to an alleged offense and showed guilty knowledge.

3. Whether the instructions, to which petitioner did not object, were adequate.

STATEMENT

A six count indictment filed in the United States District Court for the Western District of Kentucky charged petitioner with receiving and concealing six stolen automobiles moving as interstate commerce, in violation of 18 U. S. C. 2313 (R. 38–40). After trial before a jury he was found guilty on counts 4–6 (R. 182) and not guilty on the first three counts. On September 10, 1957, petitioner was sentenced to two years imprisonment for each of the three offenses of which he was convicted, the sentence to run concurrently (R. 41–42). On appeal, the convictions were affirmed *per curiam*.

1. Petitioner stipulated that all six automobiles were stolen, traveling in interstate commerce, and received by petitioner on or about the dates alleged. Only the issue of petitioner's knowledge of their stolen character was contested (R. 53). On this issue the evidence supporting counts 4–6 may be summarized as follows:

About January 1953, Rufus Owen Hesson and Orrin Wright began stealing automobiles on a partnership basis (R. 61, 64, 74–75). Hesson usually stole the cars and Wright disposed of them in a five-state area (R. 61, 89). Prior to January 1954, Hes-

son and Wright went to petitioner's used car lot in Madisonville, Kentucky, to arrange to sell some stolen automobiles (R. 61, 74, 126). Hesson remained in the car while Wright talked to petitioner. Hesson had no actual knowledge of what was said (R. 84–85).[1]

In January 1954, Hesson stole a 1953 Chevrolet in Evansville, Indiana, and took it to Madisonville, Kentucky (R. 68). He told petitioner that he intended to change the engine numbers and asked if petitioner had some place where Hesson could do the work. Petitioner took Hesson to a private garage in a residential district of Madisonville and connected a power cord which supplied current for the electric drill which Hesson used in making the alteration. After changing the motor numbers, Hesson took the vehicle back to the used car lot and received payment from petitioner (R. 69–70, 78–80, count 5).

In March 1954, Hesson stole a 1953 Chevrolet coupe in Indianapolis, Indiana, and took it to Madisonville, Kentucky. He left the automobile either at petitioner's lot or at petitioner's motel, a few blocks away. Hesson received his share of the proceeds from that sale from Wright, the usual intermediary (R. 71, count 6).

Sometime between May 19, 1955, and August 16, 1955, Hesson stole a 1955 Chevrolet sedan in Evansville, Indiana, and took it to Madisonville, Kentucky. He left it behind petitioner's motel at night and later received his payment from Wright (R. 68, count 4).

Hesson testified that the house where he changed

[1] Wright was in a federal penitentiary for car theft at the time of trial and did not testify (R. 56–57).

the motor numbers was of frame construction, located on the right-hand side of the street, and grouped with several other houses just outside of the town (R. 93, 98). The driveway to the garage was graveled and the garage itself was larger than a one-car garage (R. 96).

There was testimony from a local resident who had been employed by petitioner (R. 98–99) that petitioner had owned a home on the right-hand side of the street in "the Boggess Addition" and that there was a gravel driveway on the premises leading to a two-car garage (R. 105–106). The witness did not know whether or not petitioner owned this home as early as 1954, but the previous owner, Charles Favors, was a friend and employee of petitioner in 1954 (R. 99, 102–103, 106). On three or four occasions in the summer of 1955, or perhaps 1954, the witness saw a person named Skinner Wright at petitioner's motel or office, and once petitioner asked the witness to leave petitioner's office so that petitioner could talk to Wright in private (R. 100). Charles Favors testified that he had owned the house in the Boggess Addition in 1954, and that petitioner purchased it from him in April 1955. So far as he knew, his garage had not been used as a place to work on an automobile in 1954 (R. 159–161, 163).

Petitioner testified that he had purchased the three automobiles from different Alabama used car dealers at different times. In each instance the title papers appeared to be in order and he did not know that the vehicles had been stolen (R. 136–140). Although he knew Skinner Wright, and had purchased jewelry

from him, he had never agreed to sell stolen automobiles to be supplied by Wright (R. 130).

2. The first count in the indictment, on which petitioner was acquitted, charged that he had received and concealed a stolen 1954 Oldsmobile sedan between August 2, 1954, and November 23, 1954 (R. 38).

At the trial, Hesson testified that, early in 1954, he had stolen a 1953 Cadillac in Vincennes, Indiana, altered the motor number, delivered the automobile to petitioner, and received payment from Wright. Later, petitioner complained to Hesson that one number had not been changed, and returned the Cadillac to Hesson. Hesson changed the number which he had not previously altered, but could not re-deliver the automobile to petitioner because Hesson permitted another person to use the vehicle and the other individual was apprehended with the Cadillac. Since this left Hesson indebted to petitioner, Hesson stole the 1954 Oldsmobile described in count 1 in Tampa, Florida, and delivered it to petitioner as a partial replacement for the Cadillac (R. 63–67). Defense counsel objected to testimony concerning the Cadillac automobile on the ground that it was not set out in the indictment (R. 63).

ARGUMENT

1. In this case the single evidentiary issue was clear-cut. If Hesson, an admitted car thief, was to be believed, then petitioner had knowingly received stolen automobiles. Petitioner denied that he had ever known or dealt with Hesson, but the jury chose not to believe him as to counts 4–6. Petitioner's attack on the evidence, based on the assertion that his

testimony was entitled to credit and Hesson's was not (Pet. 8–10), presents no question for review by this Court. The uncorroborated testimony of an accomplice is enough to sustain a conviction, *Caminetti* v. *United States*, 242 U. S. 470, 495. Here Hesson was corroborated in part by other testimony showing that his recollection was sound as to certain features of the premises where he altered the automobile numbers. As was said in *Glasser* v. *United States*, 315 U. S. 60, 80:

> It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.

2. As noted above, there was only one issue in this case—the knowledge or intent with which petitioner received the stolen automobiles. Hesson's testimony that he had delivered the stolen Cadillac and that petitioner had later complained that not all of its identifying numbers had been changed was strong evidence to show that petitioner was well aware of the illegal way in which Hesson had obtained the vehicle. As such it was properly admissible even without the additional fact that, since the Oldsmobile allegedly received in count 1 was delivered as a partial replacement for the Cadillac, the facts as to the Cadillac were admissible as part of the whole transaction. *Nye & Nissen* v. *United States*, 336 U. S. 613, 618; *Michelson* v. *United States*, 335 U. S. 469, 475–476, fn. 8; *Williamson* v. *United States*, 207 U. S. 425, 450–451; *Harper* v. *United States*, 239 F. 2d 945, 946–947

(C. A. D. C.); *Herman* v. *United States*, 220 F. 2d 219, 224 (C. A. 4), certiorari denied, 350 U. S. 971; *McCormick* v. *United States*, 9 F. 2d 237, 238–239 (C. A. 8); *Degnan* v. *United States*, 271 Fed. 291, 293 (C. A. 2); cf. *Boyd* v. *United States*, 142 U. S. 450. Moreover, petitioner was acquitted on count 1, the only count to which the evidence concerning delivery of the Cadillac directly related.

Petitioner contends that other evidence of offenses not charged was also presented (Pet. 7). During the trial, F. B. I. agent Bell testified that he had interviewed petitioner several times while trying to trace automobiles stolen by Hesson. After testifying about the six vehicles named in the various counts, he was asked on cross-examination whether investigation revealed that petitioner himself attempted to conceal the cars and whether he did not sell to all who would buy (R. 119–121). In the course of this line of cross-examination, Mr. Bell said that "In addition to those six he sold several others that were also stolen, a total of twelve" (R. 121). Later, on re-cross examination, Bell testified that "there were three or four other cars interspersed with these that he's charged with, and after I went back the fourth or fifth time I told him that he didn't have to say anything to me if he didn't want to" (R. 124).

This testimony was not necessarily as to other offenses, for it did not suggest that petitioner knew at the time of receipt that the automobiles not included in the indictment were stolen. To the contrary, the fact that these automobiles were not included would permit the inference that there was no evidence of

such knowledge in those instances. Even if it is assumed that the evidence showed other crimes, defense counsel made no objection to these remarks by agent Bell and cannot complain now. *Thompson* v. *United States*, 245 F. 2d 232 (C. A. 5); *United States* v. *Pinna*, 229 F. 2d 216, 219 (C. A. 7); *Tinkoff* v. *United States*, 86 F. 2d 868, 878 (C. A. 7), certiorari denied, 301 U. S. 689.

3. Far from telling the jury that petitioner was "three-fourths guilty by admission" (Pet. 10), the judge merely instructed that there was only one issue in the case because of the stipulation. As to that issue, however, he carefully explained that petitioner was entitled to a verdict unless the fact finders were convinced beyond reasonable doubt of petitioner's guilty knowledge (R. 179–180).

Contrary to petitioner's present claim (Pet. 11), the trial judge gave a fair instruction on the effect to be given to evidence of good character, saying that it might generate a reasonable doubt of guilt (R. 180). The jury was also instructed that Hesson was an accomplice of petitioner "from his testimony, if you believe it, and if you do find that the witness Hesson took part in the commission of the unlawful acts for which this defendant is charged, his testimony is to be received by you with caution * * *" (R. 139). Since the jury first had to find that Hesson took part in the unlawful acts charged against petitioner, the instruction did not, as petitioner now claims (Pet. 12–13), have the effect of instructing the jury that the crime with which petitioner was charged had, in fact, been committed.

The judge did not instruct on the limiting effect to be given to evidence of an offense not charged, but as noted above, this evidence related to count 1 on which petitioner was acquitted. Moreover, at the trial, petitioner made no objection to the charge and did not request such an instruction. He is therefore precluded from claiming prejudice now. Rule 30, F. R. Crim. P. See *Ehrlich* v. *United States*, 238 F. 2d 481, 485 (C. A. 5); *United States* v. *O'Connor*, 237 F. 2d 466, 471–472 (C. A. 2); *Smith* v. *United States*, 230 F. 2d 935, 939 (C. A. 6).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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